



DATE: JANUARY 24, 1990
CASE 89-INA-181

IN THE MATTER OF

CREATIVE CABINET & STORE
FIXTURE, CO.

Employer

on behalf of

DANIEL FELIX
Alien

Appearance: Alexander Alvarez, Esquire
For the Employer

BEFORE: Brenner, Guill, Litt, Marden, Murrett, Romano, Tureck,
Vittone, and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On October 15, 1987, the Employer, a maker of custom-designed cabinetry, filed for labor certification on behalf of the Alien, Daniel Felix, for the position of Cabinetmaker (AF 14). The sole requirement for the position was two years experience in the job offered. The Employer's advertisement of this job opportunity yielded three responses from U.S. workers.

The Certifying Officer (C.O.) issued his Notice of Findings on August 15, 1988, proposing to deny labor certification (AF 10-12). The C.O. found that the Employer had not made a good faith effort to contact U.S. applicants in a timely manner and had not documented lawful, job-related reasons for their rejection (AF 11). On rebuttal, the Employer stated that, despite a delay in contacting the applicants, contact was nonetheless timely (AF 8-9). Furthermore, the Employer maintained that each applicant was unavailable and not apparently qualified due to "ambiguous" resumes (AF 6-8).

The Final Determination of the C.O. was issued on October 31, 1988, denying labor certification based on the determination that the Employer had not made a good faith recruitment effort and that the unavailability of each applicant was a result of untimely contact (AF 4-5). A Request for Review was filed with the Board by the Employer on November 30, 1988 (AF 1). A brief in support of the Employer's position in this matter was subsequently filed.

Discussion

The Employer received the resumes of applicants Swank, Martinat, and Wrtaza on March 2, 1988. It attempted to contact Swank by telephone on March 15 but was unsuccessful (AF 18). Two weeks later, it attempted to phone Martinat, unsuccessfully. On April 4, the Employer sent a letter to Martinat and Wrtaza which yielded no response in either case (AF 19). This letter was the first and only attempt to contact Wrtaza.

In its rebuttal, the Employer, while admitting some delay in efforts to contact the applicants, argued that it was under no obligation to immediately do so (AF 9). On brief, the Employer again offered no justification for the delay, but maintained that the period during which contact was attempted was "reasonable" (Employer's brief, page 8).

In assessing the timeliness of contact, the Board has, on occasion, examined the absolute length of time between receipt of resumes and eventual contact. See e.g., Fair Weather Marine, Inc., 88-INA-331 (September 21, 1989); Foster Electrical Services, Inc., 88-INA-284 (June 30, 1989). In these cases, however, the reasonableness of the time period was directly tied to the

circumstances present. In this case, the Employer argues that circumstance is irrelevant -- that it need not justify its admitted delay so long as contact was completed and reported on within 45 days after the resumes had been received (Employer's brief, page 8).

This contention is erroneous. Given the circumstances present, there was no need for the Employer to wait a month to contact the applicants by mail. The position was not a professional one with extensive credentials to evaluate or one involving non-local recruitment or a large number of applicants. The job to be filled, in this case, was relatively simple and only three U.S. workers were to be contacted. Where two of the applicants, Martinat and Wrtaza, appear to be qualified, there is no reason for a delay of a month. This delay is especially unreasonable given the fact that the Employer took steps to contact Swank after two weeks.

When an employer files an application for labor certification, it is signifying that it has a bona fide job opportunity which is open to U.S. workers. Inherent in this presumption is the notion that the employer legitimately wishes to fill the position and will expend good faith efforts to do so. When presented with seemingly qualified U.S. applicants, therefore, an employer who has a bona fide opening it desires to fill would, in exercise of good faith, contact these workers as soon as possible. By introducing an unwarranted delay, the Employer has abandoned a good faith effort to locate a qualified applicant and casts doubt upon whether the position is clearly open to U.S. workers.

The Employer claims that the 45 day allotment is an absolute defense to its admitted delay in attempting to contact the applicants. The 45 days allotted to complete review and evaluation of the candidates and report the results to the local job service is an outer limit to complete all steps in the recruitment process and send the written report of recruitment to the job service. This does not mean that an employer can delay the important step of promptly contacting apparently qualified applicants. Good faith would not allow that; an employer remains under the affirmative duty to commence review and make all reasonable attempts to contact applicants as soon as possible

A delay is likely to result in workers becoming disinterested in the opportunity. A delay without cause is also an indication of an employer's lack of a good faith effort to evaluate U.S. applicants. It is irrelevant that the record in this case does not show that the delay actually caused or contributed to an apparently qualified applicant's disinterest or unavailability. An employer's intent in creating an unjustified delay is equally irrelevant. In this case, seemingly qualified applicants were not contacted at the earliest convenient opportunity, and the Employer offered no reasonable justification for delay. In these circumstances, the Board presumes that the delay by the Employer is designed to discourage U.S. applicants, in violation of section 656.21(b)(7).

The Employer contends that each applicant was determined to be unqualified on review of his resume. Based on this finding, the Employer argues that it was under no obligation to interview or further contact these workers under Anonymous Management, 87-INA-672 (September 8, 1988). Anonymous Management holds that there is no duty to interview where an applicant's resume fails to show that he meets the minimum requirements.

The Employer's reliance on this case is misplaced. The Employer itself admitted in its rebuttal that the applicants' resumes are "ambiguous" as to whether they meet the minimum requirements (AF 6,8). Given this "ambiguity", it is the Employer's duty to further investigate an applicant's credentials, by interview or other contact. Nancy, Ltd., 88-INA-358 (April 27, 1989)(en banc). Furthermore, the Employer's later statement (in its brief on appeal) that none of the applicants meets the minimum requirement of two years experience appears factually incorrect. Materials submitted by Martinat indicate that he was employed as a shop assistant in a custom cabinetry shop for several years gaining experience with various methods and techniques of woodworking (AF 23-24). Applicant Wrtaza's resume shows the requisite experience as an assembly worker and a shift leader with a cabinet manufacturer (AF 37).

For the foregoing reasons, the Employer is in violation of section 656.21(b)(7) for failing to make timely contact with U.S. applicants.

ORDER

The Final Determination of the Certifying Officer is hereby AFFIRMED. Labor certification is DENIED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/VF/gaf